92-921

SUPREME COURT, U.S.
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No. _____

In The

Supreme Court of the United States

October Term, 1992

CALVIN SHIH,

Petitioner,

vs.

UNITED STATES,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

Does the statute of limitations on prosecution based on the submission of false documents to the United States begin to run when the document is prepared, when it is submitted, when instruction is given to a totally innocent third party to submit it, or when it is received by the United States?

PARTIES TO THE PROCEEDING

Parties to the Proceeding appear in the Caption.

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OFFICIAL AND UNOFFICIAL REPORTS

The opinion of the Eleventh Circuit giving rise to this Petition is not reported; it appears in the appendix to this Petition, as does the unreported order granting Petitioners Motion for Judgement of Acquittal entered in the District Court.

GROUNDS ON WHICH JURISDICTION IS INVOKED HERE

The opinion sought to be reviewed was entered on May 29, 1991 and rendered on August 6, 1991 when a timely filed Petition for Rehearing was denied by order of the Court of Appeal for the Eleventh Circuit.

The statutory provision conferring jurisdiction on this Court to review the opinion and judgement of the Eleventh Circuit is 28 USC 1254.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

18 USC 1001: Whoever, in any matter within the jurisdiction of any department or agency of the United States knowingly and willfully falsifies, conceals or covers up by any trick, scheme or device a material fact, or makes any false, fictitious or fraudulent statements or representations, or makes or uses any false writing or document knowing the same contain any false, fictitious or fraudulent statement or entry, shall be fined not more

than $10,000 or imprisoned not more than five years, or both.

18 USC 2: (a) Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.

(b) Whoever wilfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal.

18 USC 371: If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.

18 USC 3282: Except as otherwise provided by law, no person shall be prosecuted, tried, or punished for any offense, not capital, unless the indictment is found or the information is instituted within five years next after such offense shall have been committed.

STATEMENT OF THE CASE AND BASIS FOR JURISDICTION IN THE COURT OF APPEALS

The case came to the Court of Appeals for the Eleventh Circuit on appeal from a judgement of conviction in the United States District Court in and for the Southern

District of Florida. Jurisdiction in the Court of Appeals was based on 28 USC 1291.

The parties will be referred to herein by proper name or by standing here or below as appropriate. References to the Appendix to this Petition will be made by use of the symbol "A" with appropriate page number.

Shih and Rivero were charged in a three count indictment in the Southern District of Florida. The indictment was filed January 20, 1989. Count I charged the men with conspiring to violate 18 USC secs. 2, 371 and 1001. Counts II and III charged Shih with two substantive violations.

The government's theory of the case was that Shih and Rivero combined to ship knit goods into the country on transshipment documents, then divert the goods to US purchasers and ship boxes filled with (presumably) junk out of the country to cover the paperwork connected with the importation.

The last overt act charged in the indictment is that on or about January 24, 1984 the defendant Rivero arranged with Superior Assembly and Distribution Center, Inc., in Miami, Florida to transport 1092 cartons, as described in paragraph 15, to Kemtrade in Secaucus, New Jersey.

Rivero testified at trial as a Government witness. (Petitioner was in Taiwan at the times relevant to these events). Rivero testified that he diverted the 1092 cartons to Kemtrade. He further testified that he caused Denizana Shipping (a totally innocent party) to prepare an Ocean Bill of Lading for the goods to ostensibly send them out of the country, and this they did on January 20, 1991 after

Rivero instructed them to do so; but he could not remember whether he gave them those instructions on January 17th, 18th or 19th.

He further testified that he had prepared an inland bill of lading for those goods diverting them to Kemtrade in New Jersey; and in a rare moment of candor he testified that when Denizana prepared their Ocean Bill, he, Rivero, had already diverted the goods to Kemtrade. In short, Rivero instructed Denizana about the Ocean Bill on January 17th, 18th or 19th and he had already diverted the goods to Kemtrade in New Jersey.

With respect to the substantive counts, Petitioner was charged in Count II with making a false statement as to a material fact with respect to an Ocean Bill of Lading and in Count III with making a false Ocean Bill of Lading. In both Counts the Bill of Lading referred to was the one prepared by Denizana Shipping and dated January 20, 1991 pursuant to instructions which may have been given by Rivero on the 17th, 18th or 19th as discussed above in reference to the conspiracy.

The District Court after verdict granted Petitioners motion for a judgement of acquittal as to the substantive counts on the ground that the prosecutions were barred by the statute of limitations, but denied the motion as to the conspiracy count. Petitioner appealed that denial to the Eleventh Circuit. The Government cross appealed. The Eleventh Circuit affirmed as to the conspiracy and reversed as to the substantive counts leading to this Petition.

ARGUMENT

The indictment was filed January 19, 1989. Statutes of limitations are statutes of repose, *Toussie vs. United States*, 397 U.S. 112, 90 S. Ct. 858, 25 L.Ed. 2nd 156 (1970). The Government has the burden of proving the commission of the alleged offenses in this case on a date on or after January 19, 1984. *Grunewald vs. United States*, 353 U.S. 391, 77 S.Ct. 963, 1 L.Ed. 2nd 931 (1957). The evidence established that Rivero could have given the instruction to Denizana on the 17th, 18th or 19th. The state of the record precludes the trier of fact from concluding beyond a reasonable doubt that the offenses were committed within the period of the statute. The Eleventh Circuit overcame this by holding that the offense is complete when the false statement is submitted, and there is no requirement that the government actually receive or rely on the statement before the offense is completed, citing *United States vs. Smith*, 740 F. 2nd 736 (9th Cir. 1984). In *Smith* the Ninth Circuit relies on its prior case of *United States vs. Balk*, 706 F. 2nd 1056 (9 Cir. 1983), where they hold that submission is not essential to the completion of the crime; it is only necessary that the documents be prepared and that their intended use be related to a matter within the jurisdiction of a governmental agency.

There is a clear conflict between the Circuits presented here and the resolution of that conflict will obviously impact prosecutions under 18 USC 1001 as well as under various other statutes involving the preparation and submission of documents to the Government; for example, does the Statute begin to run on a fraudulent tax return when it is prepared or when it is submitted or

when the instruction to submit is given to a totally uninvolved party? Petitioner urges that the writ ought to be granted and the matter resolved.

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APPENDIX

OPINION OF THE ELEVENTH CIRCUIT.....App. 1

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OPINION OF THE ELEVENTH CIRCUIT

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

CALVIN SHIH,

APPELLANT/DEFENDANT

VS.

UNITED STATES OF AMERICA

APPELLEE/PLAINTIFF

NO. 90 5291
(Consolidated
with No. 90 5666)

DC NO.
89 20 CR KLR

Calvin Shih was tried and convicted for conspiring to (a) defraud the United States by impeding the collection by the United States Customs Service of an import duty tax and (b) make false statements as to material facts within the jurisdiction of the United States in violation of 18 U.S.C.A. §§ 371, 1001, and 2[1] (Count I); knowingly and willfully causing to be made a false statement of material fact within the jurisdiction of the U.S. Customs Service by causing the submission of a false bill of lading in violation of 18 U.S.C.A. §§ 1001 and 2 (Count II); and making and aiding in the making of a false ocean bill of lading in violation of 29 U.S.C.A. § 121 and 18 U.S.C.A. § 2 (Count III). Shih moved for a judgment of acquittal on all counts based on the statute of limitations; the district court denied the motion as to Count I, but granted it as to

[1] 18 U.S.C.A. § 2 provides that "(a) [w]hoever commits an offense against the United States or aids, abets, counsels . . . its commission, is punishable as a principal" and "(b) [w]hoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal."

Counts II and III. Both Shih and the government appeal. We affirm the district court's denial of the motion as to Count I, but reverse its grant of acquittal on Counts II and III and remand for the district court to reinstate the jury's verdict on those counts.

The statute of limitations on the crimes for which Shih was indicted is five years. *See* 18 U.S.C.A. § 3282. Limitations periods "normally begin to run when the crime is complete." *Toussie v. United States*, 397 U.S. 112, 115, 90 S.Ct. 858, 860 (1970). For a crime to be complete, each element of the crime must have occurred. *United States v. Smith*, 740 F.2d 734, 736 (9th Cir. 1984). In conspiracies for which the government is required to prove overt acts, "the statute of limitations is satisfied if the last overt act alleged and proved occurs within the limitations period." *United States v. Butler*, 792 F.2d 1528, 1533 (11th Cir. 1986). We have held that the statute of limitations "begins to run on the day following the day on which the event giving rise to the cause of action occurred." *Id.* at 1532 (quoting *United States v. Guerro*, 694 F.2d 898, 901 (2d Cir. 1982)). "The general rule is that the day of the offense or act is excluded and the day on which the indictment is filed is included." *Id.* (quoting *Guerro*, 694 F.2d at 901-02). Finally, the government has the burden of proving that prosecution was instituted within the statute of limitations. *Grunewald v. United States*, 353 U.S. 391, 396, 77 S.Ct. 963, 969 (1957).

In this case, the indictment was returned on January 19, 1989. Thus, the government's burden in this case is to

prove that the indicted offenses occurred on or after January 19, 1984.[2]

As to Count I, the district court correctly determined that the evidence was sufficient to show that overt acts in furtherance of the conspiracy occurred after January 19, 1984. The indictment alleged that on January 24, 1984, Shih's co-defendant, Rivero, arranged for the transportation of 1,092 packages (containing clothing on which import duty tax had not been paid) to a company in New Jersey. Rivero testified that he prepared an inland bill of lading, dated January 24, 1984, which indicated that the 1,092 packages were to be shipped by rail to a company in New Jersey. In addition, the evidence showed that Customs agents seized the shipment on January 24, 1984 after observing it being transported from a warehouse to the railroad. Shih's contention that the government did not prove beyond a reasonable doubt that Rivero's act occurred on January 24, 1984 – based on Rivero's testimony that "it is impossible that the same merchandise was delivery for us to Belize since we diverted already to Kemtrade in New Jersey" and Shih's conclusion, based on this, that the conspiracy was outside the statute of limitations because the merchandise had already been sent to New Jersey when the ocean bill of lading was prepared on January 20, 1984 – is unavailing, given the evidence

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[2] Shih's suggestion that the two additional days within this period – due to leap years – should be computed into the limitations period is without merit. *See United States v. Parker*, 586 F.2d 422, 429-30 (5th Cir. 1978). We note that in any period of five consecutive years there is at least one leap year.

presented by the government at trial and Rivero's admitted difficulty in expressing himself in English. The district court properly denied Shih's motion for a judgment of acquittal on Count I.

On Counts II and III, however, the district court erred in granting Shih's motion for judgment of acquittal based on its belief that the government failed to present substantial evidence that the offenses occurred within the limitations period. Its error lies in concluding that "the critical date for purposes of applying the statute of limitations . . . is the date that defendants submitted the false documents to Denizana Shipping, not the date that Denizana presented the [ocean] bill of lading [containing false information] to the Customs Service.[3] Under 18 U.S.C.A §§ 1001 and 2, it is an offense to make or cause to be made, or to aid and abet the making of, a false statement of material fact on any matter within the jurisdiction of an agency of the United States.[4] As the Ninth Circuit noted, "[t]he offense is complete when the false statement is submitted. There is no requirement that the government actually receive or rely on the statement before the offense is completed." *Smith*, 740 F.2d at 736. In Counts II and III, Shih was indicted for causing Denizana Shipping to make a false statement regarding a matter within the

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[3] The government did not conclusively establish when Shih and Rivero conveyed the false information to Denizana Shipping.

[4] Under § 2(b), criminal liability can be imposed on "one who causes an intermediary to commit a criminal act, even though the intermediary who performed the act has no criminal intent and hence is innocent of the substantive crime charged." *United States v. Tobon-Builes*, 706 F.2d 1092, 1099 (11th Cir. 1983).

jurisdiction of the Customs Service by causing it to submit a false ocean bill of lading, and for making and aiding in the making of a false ocean bill of lading. The evidence presented by the government showed that Denizana Shipping submitted the bill of lading, dated January 20, 1984, to a Customs agent on the same date. It was only at this point that the offenses for which Shih was indicted were complete because it was only at this point that Denizana Shipping made the false statement by submitting the false bill of lading to a Customs agent. Because the offense was completed on January 20, 1984, the January 19, 1989 indictment was within the statute of limitations.[5] We, accordingly, reverse the district court's grant of judgment of acquittal on Counts II and III.

AFFIRMED in part; REVERSED in part; and REMANDED.

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[5] We note that Shih also violated § 1001 when he had Rivero submit the false information to Denizana Shipping. Had it been this violation of § 1001 for which Shih was indicted, the district court would have been correct that "the critical date for purposes of applying the statute of limitations . . . is the date that defendants submitted the false documents to Denizana Shipping."

ORDER OF THE ELEVENTH CIRCUIT ON REHEARING

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

CALVIN SHIH,

APPELLANT/DEFENDANT

VS.

UNITED STATES OF AMERICA

APPELLEE/PLAINTIFF

_____/

NO. 90 5291
(Consolidated
with No. 90 5666)

DC NO.
89 20 CR KLR

"The petition for rehearing filed by Calvin Shih is denied."

The order was filed Aug. 6, 1991 per the date stamp thereon.

ORDER OF THE DISTRICT COURT GRANTING SHIH'S MOTION FOR JUDGEMENT OF ACQUITTAL ON COUNTS II AND III OF INDICTMENT

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

UNITED STATES OF AMERICA,

Plaintiff,

v.

CALVIN SHIH,

Defendant.

_____/

CASE NO: 89-0020-CR-RYSKAMP

"This matter is before the court on defendant Calvin Shih's renewed motion for a directed verdict and alternative motions for a new trial or in arrest of judgement, filed February 6, 1990. The court considers this motion to be one for judgement of acquittal, pursuant to Rule 29 of the Federal Rules of Criminal Procedure. The court shall consider Shih's motion to be properly before it, although Shih filed a notice of appeal to the United States Court of Appeals for the Eleventh Circuit on March 26, 1990. In the event that the district court has lost jurisdiction, it is amenable to a release of jurisdiction from the Eleventh Circuit.

This prosecution began with the return of an indictment against Jorge Rivero and Calvin Shih on January 19, 1989. Count I of the indictment charged the defendants with conspiring to defraud the United States by impeding the collection by the United Stated Customs Service of an import duty tax and conspiring to make false statements as to material facts within the jurisdiction of the United

States in violation of 18 U.S.C. sec. 371. The indictment charged that the conspiracy began on or about September 27, 1983, and continued until on or about January 24, 1984. Count II charged that on or about January 20, 1984, the defendants 'did knowingly and wilfully cause to be made' a false statement of material fact within the jurisdiction of the U.S. Customs Service in violation of 18 U.S.C. sec. 1001, by causing the submission of a false ocean bill of lading. Count III charged that on or about January 20, 1984, defendants 'did make and aid in the making of as false ocean bill of lading' in violation of 49 U.S.C. 121. Rivero pled guilty before trial and testified against Shih. On January 18, 1990 a jury found Shih guilty on all three counts. On March 16, 1990, Shih was sentenced to a prison term of eighteen months for each of the three counts, with the term for Counts II and III to run concurrently with that for Count I.

Shih argues in his motion for judgement of acquittal that the United States failed to prove beyond a reasonable doubt that the offenses he committed fell within the applicable five-year statute of limitations. *See* 18 U.S.C. sec. 3282. A statute of limitations normally begins to run when the crime is complete, and '[c]riminal limitations statutes are 'to be liberally interpreted in favor of repose.' ' *Toussie vs. United States,* 397 U.S. 112, 115, 90 S.Ct. 858, 860, 25 L. Ed. 2nd 156, 161 (1970). The statute of limitations begins to run on the day following that on which the indicted offense allegedly occurred. *United States vs. Butler,* 792 F. 2nd 1528, 1532 (11th Cir. 1986), *reh'g denied,* 798 F. 2nd 1420, *cert denied,* 479 U.S. 933, 107 S.Ct. 407, 93 L.Ed. 2nd 359 (1986). The day of the offense is excluded and the day on which the indictment is filed

is included in the calculation. Thus, if a conspiracy ended July 12, 1989, an indictment filed July 12, 1984, [sic.-ed] would be timely. *Id.* The government has the burden of proving that it instituted prosecution within the applicable statute of limitations. *Grunewald vs. United States,* 353 U.S. 391, 396, 77 S.Ct. 963, 969, 1 L.Ed. 2nd 931, 939 (1957); *United States vs. Hankin,* 607 F. 2nd 611, 613 (3rd Cir. 1979).

In this case, the United States had the burden of proving that the indicted offenses occurred in or after January 19, 1984, as the indictment was returned January 19, 1989. On this motion for judgement of acquittal, the court must consider evidence in the light most favorable to the government, 'together with all inferences reasonable drawn from the facts, to determine whether there is substantial evidence from which a jury could reasonably find the defendants guilty beyond a reasonable doubt.' *United States vs. Gregory,* 730 F.2nd 692, 706 (11 Cir. 1984) (citing *United States vs. Martinez,* 486 F. 2nd 15 (5th Cir. 1973)).

As to Count I, the court concludes that there is substantial competent evidence that the last overt act of the conspiracy alleged occurred January 24, 1984, as demonstrated in a bill of lading bearing that date and in the testimony of Jorge Rivero, who testified as to the preparation of the bill of lading. Thus, the prosecution of Shih on Count I of the indictment falls well within the applicable five year statute of limitations.

As to Counts II and III, the court concludes that the United States failed to introduce substantial evidence that the indicted offenses occurred within the limitations

period and thus a conviction on these counts cannot be sustained. Counts II and III share a factual basis in the timing of the false statements of material facts in the ocean bill of lading. The government argues that it introduced substantial evidence that the offenses occurred January 20, 1984, within the limitations period, because the false bill of lading bears that date. According to testimony of a U.S. Customs official, Denizana Shipping, defendant's agent, presented the bill of lading to him on January 20, 1984, at 8:50 a.m.

Nonetheless, the critical date for purposes of applying the statute of limitations to Counts II and III is the date that defendants submitted the false documents to Denizana Shipping, not the date that Denizana presented the bill of lading to the Customs Service. An offense under 18 U.S.C. 1001 is completed when the false statement is submitted, not when the government actually received the allegedly false statements. *United States vs. Smith*, 740 F. 2nd. 734, 737 (9th Cir. 1984). This conclusion accords with authority within this jurisdiction that a section 1001 violation can be complete without actual receipt of the false statement by the relevant federal agency. *Id.* (citing, *inter alia, United States vs. Herberman*, 583 F. 2nd 222, 227 (5th Cir. 1978)[1]); *see also United States vs. Diaz*, 690 F. 2nd 1352, 1358 (11th Cir. 1982) (False statements must simply have the capacity to impair or pervert the functioning of a governmental agency). No reason exists to

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[1] Fifth Circuit decisions rendered before October 1, 1981, bind the Eleventh Circuit. *Bonner vs. Prichard*, 661 F. 2nd 1206, 1207 (11th Cir. 1981).

interpret timing of an offense under 49 U.S.C. 121 differently from one under 18 U.S.C. 1001.

Thus, in order to bring the prosecution of Counts II and III within the applicable statute of limitations, the United States must prove that defendants submitted the false documents to Denizana Shipping on or after January 19, 1984. The government has not done so. According to Rivero's testimony, Denizana prepared the bill of lading based on false documents that he and Shih submitted to the shipping company some time before Denizana presented the bill of lading to U.S. Customs. Rivero testified that he could not remember when defendants submitted the documents that led to its presentation of the false bill of lading. These documents may have been submitted January 19, 1984, but the government has not proved that they were not submitted before that date. The court concludes that the government has not introduced substantial evidence that the offenses indicted in Counts II and III fell within the statute of limitations. Thus, a jury could not reasonably find Shih guilty beyond a reasonable doubt on these counts, and he cannot be punished for the offenses charged. Yet, while Shih must be acquitted as to Counts II and III, such acquittal will not change the sentence imposed for his convictions. The terms imposed for Counts II and III were to be served concurrently with that for Count I, for which the jury's guilty verdict remains intact.

Accordingly, after consideration of defendant Shih's motion and the record in this matter, it is hereby:

ORDERED AND ADJUDGED that defendant Shih's motion for judgement of acquittal is GRANTED, as to counts II and III of the indictment against him."